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No. 94-1060

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CLARK EQUIPMENT COMPANY AND FORKLIFTS, INC.,
Petitioners,

v.

CONNIE L. HABECKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. HABECKER, DECEASED, AND JOHN MICHAEL HABECKER, MINOR, BY CONNIE L. HABECKER, HIS PARENT, NATURAL GUARDIAN AND NEXT FRIEND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents, in their brief in opposition, never deny that the two issues raised in the petition are significant, nor do they deny that there are concrete intercircuit differences with respect to each. Instead, their opposition focuses almost exclusively on the merits of their claims at trial, claims which have been rejected by three successive juries. Having been tried three times already, this case highlights the untoward effect on appellate decision-making of using a standard of review, the "highly probable" standard, that is so rigorous and hypertechnical that even a minor error can mandate reversal and costly retrial. Also, this case emphasizes concretely the disquieting and persistent tension between state substantive

law and the conflicting requirements of the Federal Rules of Evidence.

1. Petitioners,[1] in their opening brief, noted "that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 287 U.S. App. D.C. 225, 229 (1990). Three circuits, including the Third Circuit, only affirm if it is "highly probable" that the error did not affect the verdict. In contrast, three other circuits use the normal civil standard and affirm if it is "more probable than not" that the error did not affect the verdict. Respondents do not deny that there is a crisp and real split in the circuits. Indeed, they characterize the circuit split as being even deeper, involving more circuits, than had petitioners. Despite that split, respondents maintain that the standard of review on appeal really is not important and that "[a]ll of the circuits, in actual practice, apply their standards similarly, no matter how worded . . . ." Respondents at 21. Not surprisingly, respondents point to no authority to support their novel hypothesis, as none exists.[2] Virtually every court and every scholar that has examined the issue has recognized that the standard of review, like the burden of proof, is a critical factor in judicial decision-making that has discernible implications for the appellate process.

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[1] Petitioners' Rule 29.1 Listing is set out at page ii of their opening brief and is incorporated by reference.

[2] The Third Circuit, which uses the "highly probable" standard, reverses civil judgments nearly 65% more often than the Ninth Circuit, which uses the "preponderance of the evidence" standard. Respondents assert that our statistics are specious, but provide no basis for such an assertion. The methodology underlying the survey of harmless error cases was detailed in our opening brief. Respondents therefore had the opportunity to replicate that study. Their failure to highlight any deficiencies in that study must be taken as an admission that they found none. That study revealed that the specific harmless error standard used by an appeals court affects the civil reversal rate. Those findings were statistically significant.

See Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decisions*, 72 CORNELL L. REV. 1115 (1987); ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970). Indeed, using respondents' logic, it really does not matter whether the burden of proof in a civil case is proof by a preponderance of the evidence, proof by clear and convincing evidence, or proof beyond a reasonable doubt. Somehow, according to the respondents, the human mind processes and treats all three standards similarly. We are aware of no court or indeed, of no law student, that would make such a claim.

2. Respondents are left to argue that this case is not an appropriate vehicle for resolving the clear circuit conflict. Simply stated, respondents continuously assert that the trial or trials were so "permeated" by error that reversal was mandated no matter which standard of review the Third Circuit used. Respondents at 5. 12. 12. 17. This argument is based solely on obfuscation: respondents have combined three trials worth of errors. Significantly, respondents do not deny that *Habecker III* involved only a single error: according to the Third Circuit, defendants' expert witness should not have been permitted to give the basis of his opinion testimony. Ironically, the Third Circuit never held that the expert's opinion was inadmissible, only the basis for that opinion. It is difficult to see how a single error involving a single aspect of a single witness's testimony in a two-week trial qualifies the trial as one "permeated" by error.

Stripped of its rhetoric, respondents' argument is a series of inferential leaps based on the erroneous assumption that *Habecker II* and *Habecker III* were interchangeable trials involving identical errors. First, they assert that the Third Circuit's harmless error analysis in *Habecker II* would have mandated reversal irrespective of which standard was used. They then go on to assert, without the benefit of citation, that *Habecker III* in-

volved identical issues as did *Habecker II* and thus, under any standard of review, the error in *Habecker III* could not have been harmless. This argument suffers from one fatal flaw: *Habecker II* and *Habecker III* were different cases, decided by different panels, involving different issues of fact and different issues of law on appeal. Significantly, the trials themselves involved different alternate designs. Under Pennsylvania product liability crashworthiness law, whether a product is defective is based on a comparison of that product with an alternative design. A product liability plaintiff, as part of its case-in-chief, is required to identify an alternate design that was not only feasible at the time the original product was manufactured, but which also would have made that product safer. *See Hammond v. Int'l. Harvesters Co.*, 691 F.2d 646 (3d Cir. 1982). In *Habecker II*, the respondents chose, as their alternate design, the Operator Restraint System ("ORS") developed by Clark in 1983 and patented in 1986. Since the 1983 ORS made the forklift safer in many situations, respondents had to prove that design was feasible in 1977. Thus, *Habecker II* focused exclusively on "feasibility." In contrast, in *Habecker III*, respondents, recognizing that they could not prove that Clark's 1983 ORS was feasible in 1977, the year in which the forklift was manufactured, abandoned reliance on the ORS and instead opted to use as their alternate design an ordinary automobile seat belt and chair wings. Since ordinary lap belts were admittedly feasible in 1977, the focus of *Habecker III* was not on feasibility, but on safety—would ordinary seat belts have made the forklift safer.

Inasmuch as the two cases were factually different—using different alternate designs—the legal issues on appeal were different. Specifically, in *Habecker II* the court of appeals reversed for four reasons: (1) the trial court erroneously admitted into evidence a computer simulation (App. 35a); (2) the trial court improperly permitted defendants to make a "state of the art" defense (App.

32a); (3) the trial court failed to provide the jury with a cautionary instruction (App. 35a-36a); and (4) defense counsel's closing argument emphasized the computer simulation and state of the art defense (App. 36a). *Habecker III*, in contrast, did not turn on any computer simulation: none was offered, none was admitted, and none was discussed in closing argument. Correspondingly, no state of the art defense was asserted, and the cautionary instruction that was not given in *Habecker II*, and which formed the basis for reversal in that case, was in fact given in *Habecker III*. Finally, the court of appeals in *Habecker III* pointed to nothing improper in the defense counsel's closing argument.[3]

In sum, the errors in *Habecker II*, according to the Third Circuit, involved the erroneous admission of a computer simulation, the inappropriate use of the state of the art defense, the failure to give a proper jury instruction, and the tenor of the closing argument. *Habecker* III involved none of these issues or errors and instead, turned exclusively on but a single evidentiary issue—whether defendants' expert witness should have been permitted to explain to the jury the reasoning underlying his opinion. Given the limited and hypertechnical nature of the error, this is a case where the standard of review would have made a difference in the outcome on appeal. *Habecker III* was not a close case, a fact not meaningfully challenged by respondents. Where a case is not close, common sense dictates, the reasoning of this Court requires, and studies of jury behavior confirm, that the admission of irrelevant evidence should have little or no effect on a verdict. *See Kotteakos v. United States*, 328 U.S. 750,

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[3] Respondents dwell on Petitioner Clark's closing argument which noted that Clark had not acted in bad faith. The Third Circuit, however, found nothing improper with that argument. Indeed, reference to Clark's conduct in petitioner's closing argument was only made after respondents addressed this issue during their closing argument. *See* R. 2025A; R. 2029A; R. 2040A.

762 (1946); Stanley Sue, Ronald E. Smith, and Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APP. SOCIAL PYSCH. 345, 351 (1973).

3. Finally, respondents fault petitioners for adhering to the published Internal Operating Procedures of the Third Circuit. In particular, respondents, citing to a footnote in petitioners' brief before the Third Circuit, argue that petitioners invited the Third Circuit to apply the "highly probable" standard. Such is not the case. The quotation that respondents reference in their opposition brief was artfully truncated to delete the fact that use of the "highly probable" standard was mandated by the Third Circuit's holding in *Habecker II*. *Habecker II* in turn was based on the leading Third Circuit case, *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3d Cir. 1985), which first established the "highly probable" standard in the Third Circuit.[4] The "highly probable" standard was and remains the binding law of the Third Circuit and a litigant, in the Third Circuit, is obligated to follow that law. *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1274 (3d Cir. 1992) (panel bound by law of the circuit embodied in prior case on issue); *United States v. Babich*, 785 F.2d 415, 417 n.2 (3d Cir. 1986) ("A panel of this court is bound by precedents") (citations omitted); *Cuban ABA, Inc. v. Christopher*, 1995 U.S. App. Lexis 943, *25-*26, n.8 (11th Cir. 1995) (no weight accorded to district court decision which failed to

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[4] That *McQueeney* is the established law of the circuit is beyond doubt. *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993) (reversing district court decision); *Advanced Medical v. Arden Medical Systems*, 955 F.2d 188 (3d Cir. 1992) (reversing district court decision under the "rigorous" *McQueeney* standard); *Reed v. Philadelphia, Bethlehem & New England R.*, 939 F.2d 128 (3d Cir. 1991) (vacating judgment of the district court); *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34 (3d Cir. 1989) (vacating district court decision).

follow the law of the circuit and instead relied on decision by Eastern District of New York). Moreover, the Internal Operating Procedures of the Third Circuit provide that a published opinion of the court expressed by a panel may not be overruled without the approval of a majority of the full court. IOP, Chapter 9; *see United States v. Babich*, 785 F.2d 415, 417 n.2 (3d Cir. 1986). Petitioners unsuccessfully sought *en banc* review. *See* App. 87a. In short, far from promoting the use of the "highly probable" standard, petitioners were merely indicating that their harmless error analysis was predicated on *Habecker II*—the law of both the case and of the circuit.

4. Respondents fail to meaningfully address the second issue before this Court, namely whether the admission of expert evidence is governed by the Federal Rules of Evidence or state substantive law. Once again, respondents do not deny that the circuits have failed to adopt a uniform and cohesive analysis concerning this issue. Instead, they argue the merits and urge that state substantive law should take precedence over the Federal Rules where the two are in conflict. Indeed, their entire argument underscores the complexity and importance of resolving this issue. For example, respondents argue that if Federal Rules were to take precedence over state substantive law then "all that the state has sought to accomplish in its development of strict liability will be lost." Respondents at 25. Whether the Federal Rules of Evidence ought to have this effect is precisely the issue that this Court should resolve.

Respondents also attempt to argue that under Fed. R. Evid. 702 and 403 the evidence at issue should not have been admitted. However, this argument is premised on circular reasoning: it is based on the assumption that state substantive law should take precedence over the mandate of the Federal Rules of Evidence. Specifically, respondents argue that the basis of the expert's opinion is not relevant by operation of state law and since it is

not relevant it cannot assist the trier of fact. This argument, though, begs the question of whether the Federal Rules take precedence over conflicting state law. Respondents also argue that the evidence was irrelevant under Fed. R. Evid. 702 as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). However, Fed. R. Evid. 702 deals with the admissibility of an expert's opinion. The Third Circuit did not hold, as respondents imply, that the expert's opinion was inadmissible or irrelevant. It only held, contrary to Fed. R. Evid. 703 and 705, that the bases of his opinion were inadmissible. Respondents' discussion of Fed. R. Evid. 403 is beside the point and has nothing to do with this case. That rule only comes into play once the evidence is deemed relevant. Here, the Third Circuit held at the outset that such evidence was not relevant, and hence, no Rule 403 analysis was ever performed by the Third Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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